Department of Labor and Industry
Board of Personnel Appeals
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 9-2001:

BROWNING FEDERATION OF CLASSIFIED EMPLOYEES, LOCAL NO. 4532, MEA/MFT/AFL-CIO, Complainant, -vs- BROWNING PUBLIC SCHOOLS, Respondent	INVESTIGATIVE REPORT AND NOTICE OF INTENT TO DISMISS

* *

I. INTRODUCTION

On April 2, 2001 the Browning Federation of Classified Employees, Local No. 4532 filed an unfair labor practice charge with this Board alleging that the Browning Public Schools were violating the Act by unilaterally attempting to exclude temporary employees from the bargaining unit. Defendant denies any violation of the law and asks that the charge be dismissed.

II. Background

The Board of Personnel Appeals has jurisdiction over this matter under Sections 39-31-103 (2) and 39-31-405, MCA. The Parties are in the midst of bargaining a successor agreement. On April 19, 2001 Defendant's counsel motioned, with the

agreement of Complainant's counsel, for a time extension for its response to this charge, which was granted. This Board then received that response on May 14, 2001.

III. Discussion

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals in using Federal Court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272, 635 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d 507, 93 LRRM 2753.

Good faith bargaining is defined in Section 39-31-305, MCA as the performance of the mutual obligation of the public employer or his representative and the representatives of the exclusive representative to meet at reasonable times and negotiate in good faith with respect to wages, hours, fringe benefits and other conditions of employment or the negotiation of an agreement or any question arising thereunder in the execution of a written contract incorporating any agreement reached. Such obligation does not compel either party to agree to a substantive proposal or require the making of a concession. See NLRB v. American National Insurance Company, 30 LRRM 2147, 343 US 395, (1952); NLRB v. Bancroft Manufacturing Company, Inc., 106 LRRM 2603, 365 F.2d 492, CA 5 (1981); and Daily News of Los Angeles v. NLRB, 73 F.3d 406, 414, 151 LRRM 2242 (1996).

Complainant's allegations stem from a Defendant School Board meeting held recently before the instant charge was filed. It alleges that during the meeting Defendant Board held a vote on whether or not to exclude temporary employees from Complainant bargaining unit who by past practice had previously been included. As a result, Complainant believed that Defendant was attempting to unilaterally alter the bargaining unit and thus filed this charge.

Defendant makes a multifaceted defense beginning with the contention that Complainant's charge statement fails to state a claim as required by ARM 24.26.680. Instead, it asserts that Complainant makes a conclusion of law. Further, Defendant charges that because Complainant had earlier failed to successfully pursue a grievance over the same issue, it is now requesting that this Board grant it something it was unable to attain in a different forum. Additionally, it suggests that Complainant file a unit clarification.

Next, Defendant makes a five-point argument that the instant charge lacks merit. First, temporary employees are not only not hired by Defendant School Board but they do not even qualify as public employees under Section 39-31-104 (9) (a), MCA. Second, because the Parties' recognition clause, Article I, specifically excludes seasonal employees and by logical extension that should include temporary employees as well. Third, that the agreement recognizes solely permanent, not temporary, employees as indicated by Article III. Fourth, no temporary employees have paid required representation fees. Last, Defendant strongly asserts that neither Party has ever recognized or treated temporary employees as bargaining unit members thus clearly establishing a past practice.

The Parties' agreement contains a curious recognition clause in Article I, 1. It identifies Complainant Federation as the exclusive bargaining representative for *"all bargaining unit members"* then goes on to list certain, excluded classes of employees. Temporary employees are neither specifically included in nor specifically excluded from the unit by the recognition clause nor by Article IX, 2 which lists general unit job "areas". What is clear, however, is that the central issue in the instant case involves the scope of the bargaining unit.

In HillRom Company v. NLRB, 139 LRRM 2673 (CA 7 1992) the Court differentiated between the scope of a bargaining unit and the transfer of work out of a unit. Relevant to this case, the Court found that the scope of a bargaining unit is a permissive subject for collective bargaining whether the unit is Board certified or mutually recognized by practice of the parties.

The NLRB held that not only is the scope of a bargaining unit a permissive subject, but it has constructed a two part determinative test to evidence it. The test differentiates between unit scope and work assignments. Antelope Valley Press, 143 LRRM 1209 (1993); and Chicago Tribune Co., 152 LRRM 1019 (1995).

Both the NLRB and the U.S. Supreme Court have addressed the issue of alleged unilateral changes to contract provisions which are permissive subjects. Quoting the Court in relevant part about a unilateral change being:

"...a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining...the remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract...not in an unfair-labor-practice proceeding."

Chemical Workers v. Pittsburgh Glass, 404 US 157 [78 LRRM 2974] (1971). See also Noblitt Bros., 139 LRRM 1336 (1991); and Tampa Sheet Metal Co., 129 LRRM 1188 (1988).

Although the agreement's recognition clause is silent on temporary employees being a part of the bargaining unit, Complainant contends that by practice temporaries had previously been included. Article X, 3 contains a "zipper clause" that reads in part:

"This Agreement constitutes the entire agreement between the parties and no verbal statements or past practices shall supersede any of its provisions."

Courts and the NLRB have found that clear and unmistakable zipper clauses like the one above do indeed relieve employers of any obligation to follow a past practice. Gannett Rochester Newspapers v. NLRB, 142 LRRM 2809 (CA DC 1993); and TCI of New York, 139 LRRM 1277 (1991). Therefore, in the present case any practice of temporary employee inclusion in the bargaining unit is superceded by the clear contract language in the recognition clause which does not identify temporaries as unit members. Were they to be unilaterally removed from the unit by Defendant there would be no violation of the Act because the zipper clause allows such actions and, further, the issue is a permissive, not mandatory, bargaining subject.

IV. Determination

Based upon the foregoing, the record does no support a finding of probable merit to the instant charge and therefore this matter must be dismissed.

DATED this 31st day of May 2001.

BOARD OF PERSONNEL APPEALS

By: _____
Michael Bentley
Investigator

NOTICE

ARM 24.26.680B (6) provides: As provided for in 39-31-405 (4), MCA, if a finding of no probable merit is made, the parties have ten (10) days to accept or reject the Notice of Intent to Dismiss. Written notice of acceptance or rejection is to be sent to the attention of the Investigator at PO Box 6518, Helena, MT 59604-6518. The Dismissal becomes the final order of the Board unless either party requests a review of the decision to dismiss the complaint.

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CERTIFICATE OF MAILING

I, Michael Berry, do hereby certify that a true and correct copy of this document was served upon the following on the 1st day of June 2001, postage paid and addressed as follows:

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